BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point applies to all the cargo which was damaged. The succeeding four points, however, deal only with the cargo which was carried in places outside of the No. 1 hold and tween decks.

Point I emphasizes the conflict in the circuits as to what evidence is sufficient to make a finding acceptable on appeal. It also discusses the conflict between this decision and that in *The Zarembo* and shows how manifestly erroneous were the decisions of the lower Courts here (pp. 18-27). Point II discusses the necessity of showing a causal relation between the damage outside of the No. 1 compartments and the alleged unseaworthiness of the *Otho* and the burden of proof with respect thereto, in the light of the 1936 Act (pp. 28-34). In Point III we argue that all the damage in the second category was proximately due to a sea peril, even though it may have been aggravated later when the vessel went by the head (pp. 34-37). Point IV is concerned with *Schnell* v. *The Vallescura*, *supra*, and questions its applicability since the passage of the 1936 Act (pp. 37, 38). In Point V we have pointed out the confused state of the record, due to the Court's failure to prescribe a criterion by which a segregation of damages can be made (pp. 39, 40).

POINT I.

The Circuit Court's affirmance of the District Court's decrees, notwithstanding its affirmance of contrary decrees in the *Zarembo*, and its application of a different rule from that prevailing in other circuits as to accepting a trial Court's findings, make a review of the present cases by this Court advisable.

The anomaly presented by opposing decisions in the same circuit in two cases whose facts to all intents and purposes are identical is so unusual that it justifies, we submit, a review of the cases at bar by this Court and the setting aside of the findings of the lower Courts, in order that the conflict may be resolved. A review is advisable further because the rule applied here by the Circuit Court as to the acceptance of the trial Court's findings is opposed to the rule in some of the other circuits, as we shall presently show.

It would be difficult to find cases more on all fours with each other than the *Zarembo* and the present cases.

The two ships were sister ships of the Isherwood design, with longitudinal framing, and were about the same age. Each was engaged on a voyage from Africa to New York when the accident occurred. The *Zarembo's* G-2 plate cracked in two places and the *Otho's* H-3 plate cracked once. If there are any differences in the cases they lie in favor of the *Otho*, for the storm which she encountered was of catastrophic proportions, and her H-3 plate concededly was a much better plate than the G-2 plate of the *Zarembo*.

The inspections of the two ships before their voyages were in substance the same. (Note: References in this paragraph to the *Zarembo* record, which is on file with this Court, will be preceded by the letter "Z"). The lower Courts here made much of the fact that Sparrow and Gledhill, the petitioners' marine superintendent and superin-

tendent engineer respectively, did not examine the shell plating in the No. 1 hold of the *Otho* from the longitudinals. But neither did they in the *Zarembo*. They made their inspections mostly on the outside, as they did here (Sparrow, Z. R. 330, 331; Gledhill, Z. R. 305). Narter, surveyor of the American Bureau, did examine the plating inside the *Zarembo's* No. 1 hold but used his testing hammer only where he thought it advisable (Z. R. 263-266). Narter's examination was substantially the same as the examination which Paul, surveyor for the Bureau of Marine Inspection and Navigation, made of the *Otho* (R. 914-937). J. D. Wilson, American Bureau surveyor, inspected the *Zarembo's* plating outside (Z. R. 958-962), and Lucey, also an American Bureau surveyor, did the same on the *Otho* (R. 261-265). Kelly, the United States Inspector, only examined the *Zarembo's* plating outside (Z. R. 1156, 1157), whereas Paul inspected the *Otho's* plating both outside and inside. The master and chief officer of the *Zarembo* inspected her No. 1 hold plating on the African coast from the longitudinals, with the cargo battens up (Z. R. 868-870), while Printzlau, the *Otho's* chief officer, examined the *Otho's* inside plating from the longitudinals four times on the African coast during cleaning and painting operations. The cargo battens were down at the time (R. 446-450; 468-476). More persons may possibly have seen the *Zarembo's* plating outside, but there is little to choose between the examinations of the plating of the two vessels.

The District Court, in *The Zarembo*, 44 Fed. Supp. 915 (E. D. N. Y.), in holding that the petitioners here had used due diligence to make the *Zarembo* seaworthy, said (p. 919):

> "Libellant makes a point of the finding of the wastage in plates F-1, and contends that by reason thereof a more careful examination of the plates, including the G-2 plate, should have been made, but it seems to me that the finding of these F-1 plates in the usual way shows that the examination was not merely perfunctory, but of a kind to develop defects.

> From the foregoing it seems clear that inspections were carefully made in the usual and approved manner.
>
> The mere fact that there may have been an unobservable defect in the G-2 plate, due to its having thinned more than 25% of its original thickness, does not entitle the libellants to recover, as it was to relieve a ship or its owner from such a situation, that the Harter Act and the Carriage of Goods By Sea Act were enacted, which give exemptions from such liability if due diligence was exercised to make the vessel seaworthy.
>
> Of course the duty to exercise due diligence cannot be delegated, nor is there any attempt to do that here, but it is difficult to understand how the ship, or her owner, could have been more diligent. It would be difficult to suggest more competent persons to make such inspections than the surveyors of the American Bureau of Shipping, the United States Government Inspectors of the Department of Commerce, the Port Engineer and Marine Superintendent of the claimant, and the officers of the ship itself, all of whom, without exception, say that they saw no excessive corrosion or groove, in the G-2 plate, and of course the thinness of the plate could only have been found by drilling, which certainly could not have been required, unless something appeared to the eyes which required it."

The Court further held (p. 920) that the condition in the *Zarembo's* G-2 plate which led to the fracture was a latent defect not discoverable by due diligence.

The Circuit Court, considering the *Zarembo* case (136 Fed (2d) 320), said (p. 321):

> "There is no doubt that in fact the ship was unseaworthy at the time she sailed. Her plating where it cracked was worn thin in excess of 75 per cent., though, of course, this is hindsight; the maximum wear considered safe is 25 per cent. Only if due diligence was exercised to make the ship seaworthy can her owner be exculpated from liability."

After referring to the inspections of the *Zarembo* which we have mentioned, the Court said further (p. 321):

> "What would thus appear ordinarily sufficient as an exercise of due diligence disclosed no flaws, with the exception of some corrosion on the plate adjacent to the one which cracked; the survey report of January, 1939, recommended its renewal within a year. But from this and from a warning of the American Bureau of Shipping, dated May 20, 1937, to all surveyors, that longitudinally framed ships like the 'Zarembo' should be watched for grooving and corrosion, libellants contend that yet more stringent tests should have been applied. No practical tests, however, are proposed. And as the district court not unreasonably suggested, the warnings, in so far as they are given any effect, probably spurred the surveyors on to exercise even more care in the tests actually employed. In any event we need not go further into the niceties of examinations for seaworthiness, for enough has been said to show that the district court's findings of due diligence were by no means clearly erroneous."

The District Court here was influenced (R. 1202) by the circular which the American Bureau issued on May 20, 1937 (R. 1200, 1201), cautioning its surveyors to be on the lookout for corrosion and grooving along the tops of the longitudinals of Isherwood ships, because of one or two fractures which had shortly before developed in the shell plating of ships of this type. But as the Circuit Court commented in the *Zarembo*, the effect of this circular undoubtedly was to spur the Bureau surveyors on to exercise even more care in the tests applied. As the Court remarked, no practical tests, beyond those already used, were proposed. And neither were any proposed here.

The problem of discovering in advance conditions which may lead to plate fractures in ships has been a peculiarly baffling one. These fractures are due principally to panting, which produces fatigue in the steel. When a vessel is mov-

ing ahead in the seas her bow pitches down into the water and then emerges, causing an alternate pressure and release of pressure, which, combined with the ship's forward motion, produces an inward and outward movement of the forward shell plating which is called panting. In Isherwood ships the plates flex above and below the longitudinal frames (Jordan, R. 298; Haight, R. 735, 736; Wilson, R. 827).

The alternating cycles of stress produce fatigue in the forward plates. The stresses are intensified at the fulcrum, which is the frame, and there is thus an uneven distribution of the stresses through the plate, which sets up differences of electro-potential. With sweat or other moisture providing the electrolyte a multitude of minute galvanic batteries is created, bringing about corrosion through galvanic action. The fracture was caused by corrosion fatigue, which is fatigue combined with corrosion, and it is much more severe than ordinary fatigue (Stoughton, R. 638-650; Butts, R. 706-722; Wilson, R. 843-866).

The problem of panting in ships is one to which classification societies throughout the world have devoted much time and study. In efforts to solve the problem various expedients have been tried, the latest one being the use of thicker plating in the forward area, which it is hoped will prove to be the final solution (Wilson, R. 828).

Wilson, who is the assistant chief surveyor of the American Bureau, said that the Bureau has not yet been able to discover the effects of panting along a longitudinal member, but is confident that a method of doing so will sometime be found (R. 867). The Bureau suddenly faced the problem of failures of ships' plating in the way of the No. 1 hold along the longitudinals about 1937 (Wilson, R. 867, 868). Before those failures occurred, it had been extremely difficult, if not impossible, for the Bureau's surveyors to find any evidence that would enable it to predict the location or time of a plate failure. It was then assumed that there must be a sharp grooving at the top of a longitudinal frame

that could easily be located in anticipation of a failure, because after the fracture occurred there was an obvious deterioration at the edge of the crack which indicated that the plate might have been grooved prior to its failure. The Bureau therefore instructed its surveyors to search carefully for such evidence, and the surveyors tried to chip the plates to see if there was any accumulation of dirt or other substances that would conceal such corrosion. But the problem was not solved. The surveyors could not find any such grooving (R. 869, 870, 883-887).

Wilson said the corrosion fatigue cannot be seen (R. 897); that even when it is progressing through the wall structure of the steel the steel can be chiseled and still present a bright appearance (R. 870). After an exhaustive study of panting and plate fractures, he came to the conclusion that a groove, as distinguished from the ordinary wastage in a plate, which he characterized as a fillet, comes after and not before the fracture. After the fracture has occurred, the material at the edge of the crack, due to the softening effect of the water flooding the ship, disappears and leaves a chisel-like edge in the plate (R. 883, 884).

The Circuit Court laid stress on an examination which Narter made of the plating inside the No. 1 hold after the *Otho's* arrival, and on which he found grooving in a number of plates along the longitudinals (R. 1272; Narter, R. 358-364). It concluded from this that it was not unreasonable for the District Court to infer that the defect in the H-3 plate could have been detected by the exercise of greater care in examining the No. 1 hold before the voyage (R. 1272). In so concluding the Court apparently disregarded entirely the fact that Narter's inspection was made under entirely different conditions from those existing when the plating was previously inspected. The hold had been full of water from January 13th until January 21st. This water unquestionably had attacked the sound metal underneath the surface scale, which, although hard

and adherent, was slightly porous, and forced it off, so that grooves were exposed to view. Narter conceded that the soaking of the plates in the salt water had loosened the scale and made the grooving much easier to detect. A substantial number of the plates he referred to as grooved appeared to be entirely sound until he had dug out a hard flint-like substance with the pointed end of his hammer and this, it should be remembered, was only after the soaking of the plates in water for many days (Stoughton, R. 648, 649; Butts, R. 713; Wilson, R. 849, 850; Narter, R. 376-381). The question, of course, is not what Narter could see or find on the shell plating after it had been soaked in water for over a week, but what Printzlau and Paul could see on the plating under normal conditions.

Counsel for the respondents have argued, and the District Court seems to have been unduly influenced by the argument (R. 1202), that the accident to the *Zarembo* was a warning to the petitioners, which should have impelled them to do still more than was done in the way of inspecting the *Otho* before the voyage. The basis of the argument is that what was sufficient to constitute due diligence in the case of the *Zarembo* was insufficient in the case of the *Otho* because of the prior accident. This argument is highly fallacious and treats the *Zarembo* case as though it was the first instance of a plate fracture in a ship. This was far from being so (Wilson, R. 867, 868). During the ten years preceding the trial Wilson had personally investigated about two dozen cases of plate fractures, some before and some after the *Zarembo* (R. 885, 886). If "warning" is the correct word, the *Zarembo* accident was no more of a warning than were the plate fractures preceding the *Zarembo*. The American Bureau, as we have shown, was very much on its guard from the start, and its surveyors made determined efforts to discover conditions which might lead to fractures, but unsuccessfully. The problem, which our opponents try to oversimplify, was in reality an extremely difficult one.

The issue as to whether the fracture developed before or after the storm, which the lower Courts also decided adversely to the petitioners, is really not the crucial point in the cases, for in the final analysis they narrow down to the question as to whether the defect in the plate was latent or not. We should point out, nevertheless, that the District Court's finding that the crack started to develop and was causing some leakage into the No. 1 starboard bilge before the storm flies squarely in the face of the testimony of the respondents' only metallurgist, Tour. He said that the development of the crack was in length and not in depth; that when it was a few inches long it was some thousands of an inch wide; that there was no gradual penetration through the width of the plate; and that laterally the fracture took place all at once (R. 981, 982). And the great influx of water, which put the ship by the head on January 13th, fixes the time when the plate cracked through. The District Court's finding No. 25 (R. 1209) that the plate was cracked and water was entering the No. 1 hold before the storm is therefore absolutely contrary to the evidence.

From our recital of the facts, the error of the lower Courts in finding that the defect in the *Otho's* plate was not a latent one appears plain. The error stands out even more clearly when the finding is contrasted with the *Zarembo* finding that the defect was latent, it being conceded that the *Zarembo's* plate was in nowhere near as good condition as the *Otho's* plate was.

Both plates were examined together in the presence of the Court at a session of the trial held at the Pier Machine Works in Brooklyn. The petitioners' experts pointed out that the grooving in the *Zarembo* plate was deeper, more extensive and much more pronounced than the grooving on the *Otho* plate (Stoughton, R. 554; Haight, R. 586, 587; see also, Butts, R. 706; Wilson, R. 842). The respondents' experts were present but never contradicted the above testimony. As a matter of fact the *Otho* plate, before the frac-

ture, would not have been subject to condemnation by the American Bureau, as deterioration had not progressed to a point where renewal was called for by the Bureau's rules (Wilson, R. 899, 830-838).

The Circuit Court, in deciding these cases as it did after holding the opposite way in the *Zarembo,* said that it applied the same rule in both cases with regard to accepting findings of fact by trial Courts and that, as an Appellate Court, it could not insure uniformity in the decisions of the District Courts on issues of fact, even though the facts in two cases might be identical (R. 1272). But we do not believe that there can be any justification for a rule or practice which would lead to the present anomalous situation, where the defects in the two plates were due to the same cause and yet the defect in the inferior plate was found to be latent while that in the better plate was found to be patent. There were many witnesses who testified in both cases. Surely they could not all be right in one case and wrong in the other. Furthermore, in view of the comparison of the plates to which we have just alluded, it verges on the absurd to say that the corrosion fatigue defect was invisible in one plate and visible in the other. If 15 men could not find the defect in the *Zarembo* plate, surely no one could be expected to find one in the *Otho* plate. The discovery of corrosion fatigue in a plate did not become any easier after the *Zarembo* accident. In short, the decision of the District Court in the *Zarembo* was supported by the weight of the evidence while here it was just the other way.

There is undoubtedly a conflict in the circuits as to the effect to be given to trial Court's findings on appeal.

In the Third Circuit the Court, in *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 Fed. (2d) 704 (C. C. A. 3), stated the rule in this way (p. 705):

> "So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous it is to be accepted on appeal as verity."

On the other hand in the First Circuit the Court, in *Fleming* v. *Palmer*, 123 Fed. (2d) 749, stated the rule in these words (p. 751):

> "A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence."

The rule as last stated also prevails in the Eighth Circuit. *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.*, 111 Fed. (2d) 412, 415 (C. C. A. 8).

The Circuit Court, in the cases at bar, seems to have followed the Third Circuit rule. Again and again it said that the District Court's findings will be sustained if they are "supportable." They must be more than "supportable," we submit. They must be supported by the clear weight of the evidence and they were not so supported here. On the contrary, they were, we believe, plainly against the clear weight of evidence.

Because of the conflict in the circuits just mentioned and because of the Circuit Court's unjustified acceptance of findings which were clearly erroneous and its refusal to follow its decision in *The Zarembo*, we respectfully submit that these cases should be reviewed by this Court on certiorari, in order that these errors may be rectified.

POINT II.

The Court below erred in failing to hold that the respondents, under the Carriage of Goods By Sea Act, had the burden of showing a causal relation between the alleged unseaworthiness of the *Otho* and the cargo damage outside the No. 1 compartments and that they failed to sustain this burden.

A most important fact to bear in mind in connection with this damage is the date when the *Otho* went by the head. The respondents' proctors contended that it was on January 11th. Printzlau, the chief officer, so testified at first, but did so under a misapprehension and corrected his testimony and said that it was on the morning of January 13th when the *Otho* was found to be by the head and was observed to be acting sluggishly (R. 509-511). The District Court accepted January 13th as the date (R. 1192, 1193; Finding No. 24; R. 1208). If the *Otho* had gone by the head earlier her officers of course would have noticed it.

Although the full force of the storm did not strike the *Otho* until the 12th, the weather was bad all day on the 11th. The seas in fact were rough through most of the night of January 10th/11th (Raymond, R. 535, 536; Printzlau, R. 453; Smith, R. 233). The storm center passed the *Otho* in the late forenoon of January 11th at a distance of 50 miles (Kimball, R. 786, 806). The liner *Santa Rosa*, which was 320 miles away from the *Otho* at noon (Bogdan, R. 419) was forced by the heavy seas to heave to at 8:34 A. M. (Brion, R. 207). The decks of the *Otho*, which was fully loaded, were therefore awash all day of the 11th.

We shall now consider the four classes of damage in this category.

First: *The damage to the residue of the palm oil in the deep tanks.* This oil was impregnated by salt and fresh

water. The salt water entered through rivets in the shell plating which were loosened by the vessel's straining in the heavy seas (Jordan, R. 296, 297; Cocks, R. 427). The fresh water came through the joints of the steam heating coils where a leak developed, again as a result of straining in the heavy weather (Cocks, R. 428). All deep tanks had been thoroughly tested before the oil was loaded and were certified to be in a fit condition to carry palm oil (Printzlau, R. 482-484; Log entries (Ex. W.) for December 2, 3 and 6, 1940).

Second: *Salt water damage in the No. 2 tween decks and lower hold.* This damage was due to the tearing of the No. 2 hatch tarpaulins, which occurred on January 12th. When the launch was smashed by the heavy seas that day its after section, while pounding around, tore the tarpaulins on the No. 2 hatch. They were ripped and chafed through on the after port side of the hatch so that sea water got in and damaged the cargo in that hatch (Finding No. 73, R. 1221; Smith, R. 239; Printzlau, R. 456, 463; Hull, R. 1093; Cocks, R. 423-426).

Third: *Sweat damage in the No. 2 compartments.* Some of the damage in the No. 2 tween decks was caused by sweat which, as is well known, is produced by the difference in temperatures inside and outside of a ship's hold and is common in the winter when ships pass from warm to cool weather (Cocks, R. 425; Printzlau, R. 464).

The No. 2 hold was equipped with three ventilators, one forward and two aft, which telescoped into the tween decks. On Sunday morning, January 12th, the after ventilator of the No. 1 hold and the forward ventilator of the No. 2 hold were unshipped and the stumps were plugged with wooden plugs and covered with canvas. They were lashed at the base of the foremast. One was washed overboard the same day and the other two days later (Hull, R. 1096, 1097; Bower, R. 1110, 1115; Maier, R 1117; Smith, R. 243;

Printzlau, R. 463, 464). The removal of the No. 2 ventilator prevented the free circulation of air through the No. 2 compartments, and this, combined with the sea water which entered No. 2, accelerated the formation of sweat (Cocks, R. 431; Printzlau, R. 464). Since it was a sea peril which prevented the proper ventilation of this cargo, the sweat damage was due to a sea peril. *The Zarembo, supra; Clark* v. *Barnwell*, 12 How. 272; *Wessels, et al.* v. *The Asturias*, 126 Fed. (2d) 999 (C. C. A. 2).

Fourth: *Damage to cargo in the bridge deck.* Two consignments of chillies (peppers) stowed in the bridge deck were damaged by sea water which entered through the bridge deck doors when they were sprung by the heavy seas on January 12th (Finding No. 74; R. 1221; Smith, R. 240; Jordan, R. 293; Cocks, R. 431).

The District Court held that the stowage of the cargo in the No. 2 compartments and in the bridge deck was proper (Findings Nos. 76 and 77; R. 1221). No question of stowage arose with respect to the palm oil in the deep tanks.

We have, then, a situation where the originating factor in these four classes of damage (the storm) came into operation before the *Otho* went by the head on January 13th. The sea water poured into the No. 2 hatch and the bridge deck and sweat was forming in No. 2 tween decks on January 12th. If the weather on January 12th was severe enough to cause all the structural damage which was done that day (*supra*, p. 3), it obviously was heavy enough to loosen the shell plating rivets adjacent to the deep tanks and the deep tank heating coils.

The District Court's view, drawing the best inference we can from its vague remarks about an apportionment (R. 1203), presumably was that sea peril was the first cause of this damage and that subsequently the damage was aggravated when the ship went by the head. The puzzling thing about it all is that the Court, in Finding No. 71 (R.

1220), wherein it held the sweat damage in No. 2 attributable to the *Otho's* unseaworthiness, deliberately *excluded* the salt water damage in that hatch. There is no finding relating this salt water damage to the cracked plate. Then, strange to say, the Court found a causal relation between the fracture and the damage in the bridge deck (No. 72, R. 1220, 1221), although the No. 2 hatch tarpaulins and the bridge deck doors were damaged at about the same time.

The District Court was clearly right in excluding the salt water damage in No. 2 from its findings as to causal relation. But, equally clearly, it was wrong in finding a causal relation in the case of the other damage, for there was no reason for any distinction between the classes and the Court gave none.

While there was a causal relation between the cracking of the plate and the damage to the cargo in the No. 1 compartments and the jettisoning of the palm oil, the respondents utterly failed to show that the damage to the cargo outside of No. 1 resulted from the plate fracture. And the burden was on them to do so, we submit, under the Carriage of Goods By Sea Act.

This Court was not yet decided whether the 1936 Act changed the law established in *May* v. *Hamburg etc. Gesellschaft (The Isis)*, 290 U. S. 333, which held that it was unnecessary for a cargo-owner to show a causal connection between unseaworthiness and cargo damage in order to hold the carrier. In the absence of a pronouncement by this Court, however, it seems to be generally agreed that the *Isis* rule no longer prevails.

The exemptions in Section 3 of the Harter Act (46 U. S. C. A. § 192) were conditional. But those provided by Section 4, paragraph 2 of the 1936 Act are unconditional.

Section 4, paragraph 1, of the 1936 Act (46 U. S. C. A. § 1304(1)) provides in part as follows: "Neither the carrier nor the ship shall be liable for loss or damage arising or

resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy." This section is discussed in "Knauth on Ocean Bills of Lading," 1941 Edition, pages 124-126.

Deutsch, in his book entitled "Model Ocean Bill of Lading," states (p. 6):

> "In any event, assuming that the Carriage of Goods By Sea Act provides that the carrier shall not be liable for loss caused by unseaworthiness, unless the loss is caused by the carrier's want of due diligence to make his vessel seaworthy, the statute makes this important change in the American law in favor of the carrier. In other words, prior to the enactment of the Carriage of Goods By Sea Act, under the decision of the Supreme Court in the case of the *Isis, supra,* the carrier was liable for loss or damage to cargo, if he had failed to use due diligence to make his vessel seaworthy, whether the loss had any causal connection with the unseaworthiness or not. Under the generally accepted construction of the Carriage of Goods By Sea Act, the carrier is not liable in that case unless there is an actual causal connection between the lack of due diligence and the loss."

Furthermore, in the cases which have construed the Act to date, it has been held that the cargo-owner has the burden of showing that unseaworthiness in the ship caused the damage to his cargo.

In *The Aakre,* 31 Fed. Supp. 8 (S. D. N. Y.), affirmed 122 Fed. (2d) 469 (C. C. A. 2), the Court, considering a case arising under the Canadian Water Carriage of Goods Act, 1936, stated (p. 12):

> "It follows, and I hold, that under the provisions of the contract of carriage herein the burden was on the cargo to show that the ship was unseaworthy in some specified respect, which caused or contributed to the loss from one of the excepted statutory perils relied on by the ship-owner—which in this cause was

> stranding—an accident of the sea—due to negligent navigation."

In *The Temple Bar,* 45 Fed. Supp. 608 (D. C. Md.), the Court, comparing the Harter Act and the Carriage of Goods By Sea Act, said (p. 613):

> "By the 1936 Act, the vessel owner, while required to exercise due diligence in furnishing a seaworthy vessel, incurs no liability for loss arising even from unseaworthiness unless such is caused by lack of due diligence to make the vessel seaworthy. In short, the later Act, unlike the earlier one, does not condition its exemptions upon due diligence to make the vessel seaworthy, but only liability for loss due to unseaworthiness is so conditioned. • • •
>
> Therefore, to summarize, the following principles seem clear from the language of the Act: (1) The shipowner has the burden of proving that the vessel was seaworthy when she sailed, or that he had exercised due diligence to make her so; but (2) even if the shipowner fails in this proof, the claimant still cannot recover unless he sustains the burden of proving that the unseaworthiness did, in fact, cause the loss or damage in question."

See also, *The Thomas J. Howard,* 1943 A. M. C. 1263, 1273.

The word "unless" in Section 4 is particularly significant as showing where the burden lies. The Fire Statute, R. S. 4282 (46 U. S. C. A. § 182), provides an analogy. It exempts the ship-owner from liability for loss or damage arising by fire on the ship unless such fire is caused by the design or neglect of the owner. Under that statute the burden is upon the cargo-owner to show design or neglect. *The Salvore,* 60 Fed. (2d) 683 (C. C. A. 2); *The Older,* 65 Fed. (2d) 359 (C. C. A. 2).

Therefore, under the 1936 Act, as interpreted so far, the respondents had the burden of showing that this damage resulted from the crack in the plate. In order to sustain this burden, they at least had to show that the *Otho*

was by the head *before* January 12th, when the full force of the storm struck her and did the damage to the ship (*supra*, p. 3) which let the water into the places where this cargo was carried and made it necessary to reduce the ventilation in No. 2. They failed to meet their burden. The *Otho* went by the head on the 13th. The petitioners therefore in any case should have been exonerated from liability for the damage to all this cargo outside of No. 1.

POINT III.

The Court below, in failing to hold that the proximate cause of all the damage to this particular cargo was a peril of the sea, has rendered a decision which is in conflict with applicable decisions of this Court.

It is certain that the District Court, as evidenced by its remarks about sea peril and an apportionment of the damages (R. 1203), and its deliberate exclusion of the sea water damage in No. 2 from Finding No. 71 (R. 1220), was of the opinion that part of the present damage was proximately due to sea peril. The Court's reason for holding the petitioners liable for all this damage undoubtedly was due to its mistaken idea that *Schnell* v. *The Vallescura* required a segregation at the trial (*infra*, p. 39).

But the District Court's fundamental error, we believe, lay in its failure to hold that a sea peril was the proximate cause of *all* this damage, for it was the sea peril which first paved the way for the water to enter the No. 2 hatch, the bridge deck, and the deep tanks, and which necessitated the precaution of unshipping the two ventilators. If the damage was later increased when the vessel went down by the head, the proximate cause of all the damage, within the decisions of this Court, was nevertheless a sea peril.

In *The G. R. Booth,* 171 U. S. 450, the situation was just the reverse of the one here. There cargo was damaged by sea water which entered the ship through an opening produced by an explosion of 20 cases of detonators in the hold and the question was whether or not the loss was due to a peril of the sea. This Court held that the explosion, and not the sea water, was the proximate cause of the damage. It said (p. 460):

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. * * * There being two concurrent causes of the damage—the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause."

In *Insurance Co.* v. *Boon,* 95 U. S. 117, goods in a store in Glasgow, Mo. were insured under a policy exempting the insurer from liability for any loss or damage by fire happening by means of any invasion or of any military or usurped power. An armed Confederate force attacked the city and the commander of the Union forces set fire to the City Hall in order to prevent military stores therein from falling into the possession of the invaders. The fire spread from one building to another until it reached the store containing the insured goods and destroyed them.

This Court held for the insurers. It said (p. 133):

> "In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole. * * * Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers."

In *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, this Court said (p. 199):

> "But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. * * * And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant."

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, cotton in a warehouse was insured against fire by a policy, which provided, among other things, that the insurer should not be liable for loss due to explosion. An explosion took place in one warehouse, causing a fire which spread to a second warehouse, and thence to a third warehouse which contained the insured cotton. This Court held that the loss of the cotton was due to the explosion.

See also *The Mohawk*, 8 Wall. 153; *The Munaires*, 1 Fed. (2d) 13 (C. C. A. 2); *The Strathdon*, 89 Fed. 374 (S. D. N. Y.).

Because of the conflict between the decision below and those of this Court in the respect mentioned, and because of the Court's failure to exonerate the petitioners and the *Otho* from liability for this damage on the ground that it was all proximately due to a peril of the sea, we submit that a writ of certiorari should issue to correct the error.

POINT IV.

The petitioners, in view of the change in the burden of proof made by the Carriage of Goods By Sea Act, should no longer be required to segregate exempt damage from non-exempt damage at the risk of being held liable for all, and the lower Courts erred in so holding.

Both lower Courts were of the view that the petitioners must apportion these damages or pay for everything, under *Schnell* v. *The Vallescura.* We do not think that this is so since the 1936 Act, which made a sweeping change in the law as to a carrier's liability where unseaworthiness is charged. It is therefore open to serious question whether the rule laid down in *The Vallescura* has survived the Act, at least insofar as a situation like this is concerned.

The Circuit Court of Appeals, in deciding *The Vallescura,* 70 Fed. (2d) 261 (C. C. A. 2), held that since the decay which damaged the onions came within a bill of lading exemption, the burden of proving negligence was on the cargo-owner, and therefore the cargo-owner was obliged to show what part of the decay was due to the carrier's negligence.

This Court reversed the Circuit Court on the ground that the state of the proof was such as to show that the damage was due either to decay, an excepted peril, or to the carrier's negligence and therefore the carrier must

bring itself within the exception or show that it had not been negligent.

Here the respondents charge unseaworthiness. But under the cases we have cited (pp. 32, 33) they must show that the unseaworthiness caused their damage. They are therefore in the position of a cargo-owner before the 1936 Act, whose damage was within an excepted cause, which required him to prove negligence on the part of the carrier. That was the basis on which the Circuit Court decided *The Vallescura.*

The reason why this Court decided *The Vallescura* as it did seems evident from the emphasis it laid on *The Folmina,* 212 U. S. 354, as a precedent. In *The Folmina,* cargo was damaged by sea water but the carrier failed to show how the water entered the vessel. It was held there that the carrier must show that the water came in as a result of a sea peril and that where the cause of the entry was not explained the carrier was liable.

Since the 1936 Act, as construed up to the present time, places the burden on the cargo-owner to show that his damage has resulted from the ship's unseaworthiness, where seaworthiness is the issue, there is a very serious question whether *The Vallescura* rule now applies to cases like those at bar. If we are correct as to this, the Courts below should have exonerated the petitioners from liability as to this cargo because the respondents failed to prove what part of the damage, if any, was traceable to the fracture in the plate.

The question presented under this point is clearly of sufficient interest and importance to merit review by this Court on certiorari.

POINT V.

The lower Courts, by failing to establish a criterion under which the damage can be segregated, have made it impossible for the petitioners, if the burden of making a segregation is still theirs, to secure exoneration as to any of the damage outside the No. 1 compartments. This manifest error should be corrected by this Court.

Should this Court disagree with all of our preceding contentions, the problem of apportionment would still remain.

The District Court held the petitioners liable for all this damage under the mistaken idea that they were required to separate the various classes of damage at the trial. This was plainly erroneous, for, as we pointed out on the appeal, the segregation question, on which *The Vallescura* was decided against the carrier, did not really come up until it was found impossible to segregate the damages before the Commissioner. The Circuit Court agreed with us, saying that the opportunity to make an apportionment will still be open to the petitioners before the Commissioner (R. 1273). But neither Court gave any clear indication as to which damage was considered exempt and which not. No general principle was laid down, so there is no way of knowing what to segregate. The record, in fact, is in a badly confused state on this point.

We are completely in the dark as to what the District Court had in mind when it said that it was unable to make an apportionment because of insufficient evidence (R. 1203). We do not know whether it was thinking about an apportionment as between the sweat and salt water damage in No. 2, or an apportionment as between damage caused by sea peril and any aggravation of such damage caused by the vessel's going by the head, or to all of them. The confusion was deepened by the Court's findings and conclusions, which remained unclarified in spite of our efforts to have them clarified.

In dealing with the damage in No. 2, for example, the Court found that only the sweat damage therein was attributable to the unseaworthiness of the *Otho* (Finding No. 71, R. 1220). The salt water damage was deliberately omitted, making the inference irresistible that the Court considered that damage to be due to sea peril.

In spite of its exclusion of the salt water damage in No. 2 from Finding No. 71, the Court proceeded to find that the sea water damage in the bridge deck was attributable to the cracked plate (Finding No. 72, R. 1220, 1221), although the damage to the bridge deck doors and the No. 2 hatch tarpaulins was caused by the seas at about the same time.

In Conclusion of Law No. 8 the Court held that all the damage involved in the litigation was caused by the *Otho's* unseaworthiness (R. 1222, 1223). And in Conclusion of Law No. 12 it said that the petitioners' failure to use due diligence to make the vessel seaworthy resulted in the damage to the cargo stowed outside the No. 1 hold (R. 1223).

In our petition for a rehearing in the Circuit Court we pointed out the inconsistency between the various findings dealing with this cargo and between Conclusions Nos. 8 and 12 and Finding No. 71 and also asked for a modification of the decrees to provide some clear basis for making an apportionment. But the Court denied our petition.

If this Court should disagree with our argument as to proximate cause in Point III (pp. 34-37) we respectfully ask that a writ of certiorari issue in any event and that the lower Court's decree be modified so that we may know where the line of demarcation is between the petitioners' liability and non-liability for the damage to the cargo outside of the No. 1 compartments, and be enabled to make an apportionment before the Commissioner accordingly.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated March 24, 1944.

JOHN W. CRANDALL,
Counsel for Petitioners.

GEO. WHITEFIELD BETTS, JR.,
HELEN F. TUOHY,
Of Counsel.